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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY HOSPITAL OF BELLAIRE,
Petitioner,

v.

NANCY DELGUZZO, EXECUTRIX, ETC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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THE QUESTIONS PRESENTED

Whether the strict application of a state notice of appeal rule, where the Appellant has provided notice to both the State Court and the opposing party that it has instituted the appeal, and where for some unknown reason the notice of appeal has not been timely docketed, results in an unconstitutional deprivation of due process and equal protection of law?

PARTIES TO THE PROCEEDINGS

This case involves important constitutional issues of due process and equal protection of law and the right to a jury trial, and adjudication of cases on their merits rather than upon procedural niceties and technicalities under State procedural rules. The Petitioner is the City Hospital of Bellaire, 4697 Harrison Street, Bellaire, Ohio. The Petitioner is a nonprofit private corporation incorporated under the laws of the State of Ohio. The Respondent is one Nancy DelGuzzo. She is the Executrix of the Estate of her late husband Ettor DelGuzzo, Dell Knoll Drive, Bellaire, Ohio, 43906.

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No. ———

THE CITY HOSPITAL OF BELLAIRE,
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v.

NANCY DELGUZZO, EXECUTRIX, ETC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The City Hospital of Beliaire respectfully petitions for a Writ of Certiorari to review the order of the Supreme Court of Ohio refusing to certify the record and dismissing Petitioner's appeal, entered in this proceeding on January 22, 1986. The effect of this order is to uphold the Court of Appeal's dismissal of Petitioner's appeal.

OPINIONS BELOW

This case involves alleged medical malpractice. Under the applicable Ohio statutes, medical malpractice cases are first heard by an arbitration panel. Ohio Revised Code § 2711.21. (App. 80a) Either party may refuse to accept the arbitration decision and thereby receive a trial in the Common Pleas Court of the county in which the litigation is pending. A jury trial had been demanded in the pleadings. The action herein was arbitrated. An

award of $675,000 was made in favor of Respondent by a majority of two arbitrators. (App. 18a) A dissenting opinion was filed. (App. 25a)

Following the arbitration decision in this matter, a hearing was held in the Court of Common Pleas, Belmont County, Ohio. The trial judge denied Petitioner its right to a jury trial. The journal entry order is dated August 12, 1985. (App. 7a) His decision is at App. 8a. The Court of Appeals of Belmont County, Ohio, Seventh Appellate District, both *sua sponte* and summarily without hearing or oral argument, dismissed the Notice of Appeal as untimely filed. The Court of Appeals' decision in this case is not reported. A copy is in the Appendix at page 4a. Two of the three Appeals Court Judges, while concurring in the dismissal, indicated the unfairness and unjustice of the proceedings. (App. 6a)

The Supreme Court of Ohio by a 4 to 3 margin refused to certify the record and affirmed without opinion. Again, no hearing was held. A copy of the Supreme Court of Ohio's announcement of the dismissal appears at App. 3a.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The dismissal of the Supreme Court of Ohio was entered on January 22, 1986. This Petition for Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 and 1257(3), and the Fourteenth Amendment to the Constitution of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. The Constitution of the United States, Seventh Amendment, App. 69a.

2. The Constitution of the United States, Fourteenth Amendment, App. 67a.

3. Ohio Revised Code § 2711.21. (App. 80a)

4. Ohio Rule of Civil Procedure 38 (App. 70a)

5. Ohio Rule of Appellate Procedure 3(C). (App. 73a)

6. Ohio Rule of Appellate Procedure 4. (App. 72a)

7. Federal Rule of Appellate Procedure 4. (App. 74a)

STATEMENT OF THE CASE

The Complaint was filed on June 19, 1980, in the Court of Common Pleas, Belmont County, Ohio, and is entitled *Nancy DelGuzzo Executrix etc.* vs. *Dr. Joseph L. Williams, et al.*, Case No. 80-CIV-134. A jury trial was demanded. The Complaint alleged that as a proximate result of the Defendant doctors' negligence, the Respondent's decedent came to his premature death on November 18, 1979. Petitioner herein was later added as a defendant by amendment. A jury trial was again demanded. (App. 62a) Petitioner filed an Answer, wherein it denied any liability. (App. 59a) All Defendants except The City Hospital subsequently entered into covenants-not-to-sue.

In 1984, the arbitration hearing was held. The arbitration panel majority of two filed its report. (App. 18a) The third arbitrator filed a dissenting opinion on August 3, 1984. (App. 25a) On October 31, 1984, within the time limits prescribed by the Ohio Arbitration Statutes, the Petitioner, The City Hospital, filed a Motion to Modify the Arbitration Award. (App. 57a) It requested that the arbitrator's award be modified by deducting the value of the covenants-not-to-sue which were entered into between the Respondent and the other Defendants.

On February 5, 1985, a hearing was held in the Court of Common Pleas, Belmont County, Ohio. On March 22,

1985, the Trial Court entered judgment in favor of the Respondent, against the Petitioner The City Hospital. (App. 11a) In so doing, the Trial Court overruled the Motion of the Petitioner to modify the award of the arbitrators. The Trial Court also sustained the motion of Respondent to confirm the award of the arbitrators.

On April 1, 1985, the Petitioner gave notice that it rejected the arbitrator's award as determined by the Court in its decision of March 22, 1985. (App. 55a) It further moved the Trial Court for an order to amend the pleadings in accordance with § 2711.21 of the Ohio Revised Code and for a trial date at which time the issues in this case may be decided by a jury.

On April 18, 1985, Petitioner filed a motion to vacate based upon the inherent common law power of the Court, or alternatively Rule 60(B) of the Ohio Rules of Civil Procedure. (App. 53a) Petitioner asserted that the Trial Court had no power to award and journalize a judgment under the proceedings set forth in § 2711.21, of the Ohio Revised Code.

On August 12, 1985, the Trial Court overruled the Petitioner's Motion to Vacate and the Motion to Amend the Pleadings and for a trial date. (App. 7a) The City Hospital's counsel, on August 30, 1985, prepared a Notice of Appeal for filing. An affidavit attesting to this was filed. (App 51a) The original Notice plus copies, were placed in an envelope addressed to the Clerk of Courts, Belmont County Courthouse, St. Clairsville, Ohio, 43950. The envelope was mailed by first class mail, postage prepaid, and was placed in the United States Mail service on the afternoon of August 30, 1985. (App. 51a) Copies of the Notice of Appeal were also mailed that same day to Respondent's counsel, Richard L. Lancione in Bellaire, Ohio, and John G. Lancione, in Cleveland, Ohio. (App. 51a) *It is acknowledged* by Affidavits that the copies of the Notice of Appeal were received by each attorney for Respondent. (App. 43a and 44a)

On September 5, 1985, Petitioner's attorney forwarded a request for the transcript to the Court Reporter for Belmont County, Ohio, a copy of which was time-stamped by the Clerk September 6, 1985, and returned to Petitioner's counsel on September 13, 1985. (App. 45a) This filing was well within the 30 day appeal rule.

On Monday, September 23, 1985, counsel for Petitioner was notified by Attorney John G. Lancione that the Clerk of Courts did not docket the Notice of Appeal. Upon inquiry, the Clerk stated he did not receive a copy of the Notice of Appeal. (App. 51a) The Notice of Appeal and accompanying letter were not returned by the United States Postal Service to Petitioner's counsel. (App. 51a)

Therefore, on September 26, 1985, counsel for Petitioner mailed by first class mail, postage pre-paid, a Second Notice of Appeal, addressed to the Clerk of Courts, Belmont County Common Pleas Court, Belmont County Courthouse, St. Clairsville, Ohio, 43950. This Notice of Appeal was received and was filed on September 30, 1985. (App. 41a)

On October 23, 1985, the three member Court of Appeals of Belmont County, Ohio, Seventh Appellate District, *sua sponte* and summarily dismissed the Notice of Appeal filed on September 30, 1985, as untimely filed. (App. 4a) Appeals Court Judge Edward A. Cox, however, issued a separate opinion and stated:

> "I feel that under the facts of this case, in which all parties agree that the Notice of Appeal was mailed well within rule, and for some unknown reason was never received by the Clerk's Office, that the Appeal, in all fairness, should not be dismissed. . . .
>
> I find the enforcement of Ohio Rules of Appellate Procedure 4(A), under this statement of facts, to be patently unfair, and I signed the Entry of Dismissal only because I find that I have no authority to do otherwise."

Appeals Court Judge Joseph Donofrio concurred in this opinion. (App. 6a)

Due Notice of Appeal along with accompanying Memorandum in Support of Jurisdiction was filed in the Ohio Supreme Court on November 21, 1985. In its Memorandum in Support of Jurisdiction Petitioner asserted three Propositions of Law, including state law grounds and the constitutional grounds asserted here. (App. 34a, 38a) On January 22, 1986, the Supreme Court of Ohio refused to order the record certified and summarily dismissed the appeal. (App. 1a)

The City Hospital of Bellaire has never had one day in Court on the merits of this case and yet has a $675,000 judgment entered against it! It has been deprived of its right to a jury trial in the Common Pleas Court. It has been refused its appeal to the Ohio Court of Appeals, and now, it has been refused an appeal by the Supreme Court of Ohio. Petitioner, The City Hospital, contends that the Ohio Rules of Appellate Procedure, as applied to the Petitioner herein, deprived the Petitioner of due process and equal protection of the law as provided for in the United State and Ohio Constitution.

A. The Statute.

Ohio Revised Code § 2711.21(C) provides:

> "(C) If the decision of the arbitration board is not accepted by all parties thereto, the pleadings shall be amended to aver both the fact that the controversy was submitted to an arbitration board and the decision of the arbitration board. The decision of the arbitration board, and any dissenting opinion written by any board member, shall be admitted into evidence at trial upon the offer of any party, if the court conducts a review of the arbitration decision and any other relevant information submitted by the parties and concludes that:

(1) The findings of fact by the arbitration board were not clearly erroneous;

(2) The decision is in accordance with applicable law;

(3) The procedures required for conducting the hearing and rendering the decision were followed fairly and properly without prejudice to either party."

B. The Rules.

Rule 1 of the Ohio Rules of Appellate Procedures provides that, "These rules govern procedure and appeals to Courts of Appeals from the trial courts of record in Ohio." The Ohio Rules of Appellate Procedure result from the Ohio Supreme Court's power to prescribe rules governing practice and procedure in all courts of the State granted in the Constitution of Ohio pursuant to Ohio Constitution, Article IV, Section 5(B).

Appellate Rule 3(A) provides an appeal as of right shall be taken by filing a Notice of Appeal with the clerk by the trial court within the time allowed by Rule 4. Appellate Rule 4 provides that:

"In a civil case the Notice of Appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from."

Appellate Rule 3(C) provides that:

"The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the Appellant added, as appropriate."

Appellate Rule 3(C) suggests the use of form 1 in the Appendix of Forms, but mandates no particular form nor language.

C. The Trial Court, Court of Appeals, and the Supreme Court of Ohio's Decisions.

The Common Pleas Court denied Petitioner a jury trial in his order of August 12, 1985. The trial judge said:

> "The Defendant, City Hospital of Bellaire, has not followed the procedure as set forth in § 2711.21 and the Court can find no legal justification to vacate its judgment entered March 22, 1985 and said Defendant's motion to amend pleadings and for a trial date filed April 2, 1985 is not within time. Therefore, both motions are hereby overruled."

The Court of Appeals, Belmont County, Ohio, Seventh Appellate District, *sua sponte* summarily dismissed the Notice of Appeal as untimely filed. The Court stated, "This rule [4(A)] is mandatory and this Court has no discretion to allow delayed appeals in a civil matter." As shown earlier, two of the three Appeals Court Judges in their concurring opinion found this to be unfair.

The Ohio Supreme Court's order dismissed the City Hospital of Bellaire's appeal on January 22, 1986. Out of the seven Justices to hear the request, *three* of the seven, Justices Holmes, Brown and Wright, J.J. dissented from the dismissal. They brought the total to 5 Judges who felt the procedures here to be patently unfair.

REASONS FOR GRANTING THE WRIT

I. The Strict Application Of Ohio Rule Of Appellate Procedure On The Facts Of This Case Has Deprived Petitioner Of The Due Process Of Law And The Equal Protection Of The Laws.

A. *Petitioner Has Been Deprived of Due Process of Law.*

The issue in this case presents an important and recurring question of constitutional law that should be addressed by the Court; whether the strict application of procedural rules, in a manner that precludes any discretionary regard for the unique facts and circumstances of

a particular case, can be so unfair as to deprive a litigant of due process and the equal protection of the laws.

In this case, Petitioner timely, and formally, notified both the state court and opposing counsel of its initiation of an appeal of the $675,000 arbitral award rendered against it. Petitioner provided such notice to the court system, and to its opponent, and pursued the appeal in the normal manner by placing the notice of appeal in the mail. For some reason, clearly beyond Petitioner's control, the notice of appeal was never docketed as having been filed. The letter was never returned and it is reasonable to presume that the notice *may have been* properly delivered to the Court, but somehow mishandled after delivery, filed in the wrong case, or remains unopened and misplaced somewhere in the court system itself. Or, less likely, it may have been mishandled by the postal service, sent to the wrong place, or similarly misplaced by the postal system. In dismissing the appeal, on the basis of an absolute, literal application of Appellate Rule 4(A), the Ohio courts effectively held that any inquiry into the reason why the appeal was not filed, was barred.

No plausible state interest could justify this approach to the state procedural rule. Petitioner's opposing counsel timely received a copy of the notice of appeal: No *party* has, therefore, been prejudiced in any way by the technical deviation from the rules. Indeed, the purpose of a notice of appeal, in Ohio, "is to apprise the opposite party of the taking of an appeal." *Capital Loan and Savings Co.* v. *Biery*, 134 Ohio St. 333 at 339 (1938). Clearly, the only purpose of the rule was satisfied here.

Nor has the state court system itself been prejudiced: The timely request for preparation of the transcript for purposes of appeal satisfied the state interest in the efficient prosecution of judicial proceedings. The State's interest was clearly satisfied by that notice, and the notice timely provided to the plaintiff. No state interest is served by denying an appeal in these circumstances.

At the same time, an arbitral judgment of $675,000 has been imposed on Petitioner. That award has been rendered, and Petitioner denied any opportunity to defend against it. Indeed, Petitioner will be forced to pay this award without any trial, or hearing, whatsoever. In these unique circumstances, the failure to consider Petitioner's claim, depriving it of any defense to the plaintiff's claim, has deprived Petitioner of due process of law and equal protection of the laws.

The Fourteenth Amendment to the United States Constitution [1] states, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

At the outset, it is beyond question that the word "person" as used in the Fourteenth Amendment, includes corporations, at least insofar as it prohibits a state from depriving them of property without due process of law. *Covington & Lexington Turnpike Rd. Co.* v. *Sandford*, 164 U.S. 560 (1896). It is also not subject to question that the word "State" as used in the Fourteenth Amendment includes instrumentalities and agencies of a state, including the judicial branch of government as well as the state itself. *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Thus, the United States and Ohio Constitutions mandate that The City Hospital be afforded due process of law in proceedings before the Courts of the State of Ohio.

While the phrase "due process of law" has never been susceptible of precise judicial definition, one of the definitions which has received judicial approval on numerous occasions was first offered by Daniel Webster in the celebrated *Dartmouth College* case:

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[1] The Constitutional guarantee of due process and equal protection of law found in the Fourteenth Amendment to the U.S. Constitution and in various sections of the Ohio Constitution have been held by the Supreme Court of Ohio to be "substantially equivalent". *State, ex. rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 8 (1980).

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Dartmouth College* v. *Woodward*, 4 L. Ed. 629, 645 (1819).

All accepted definitions of "due process of law" have one thing in common. Notice to all parties of claims made against them, and an opportunity to be heard on such claims, are required under any definition of "due process of law". *Boddie* v. *Connecticut*, 401 U.S. 371, 378, (1971).

Due process analysis proceeds essentially in two stages. The first inquiry raises the question whether there has been a deprivation of some form of "property" protected by the Fourteenth Amendment. Here, the issue is well settled. Petitioner has been deprived of the right to appeal, and thus to vindicate its legal claims, a deprivation of a protectible property interest, in itself. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). To arbitrarily deny the right of recourse to the appellate process, is itself a due process violation.

In this case, however, the deprivation of "property" is even more clear than in *Logan*: In *Logan*, the appellant was deprived of an inchoate claim that he sought to vindicate in the courts; in this case, Petitioner has not only been deprived of recourse to the courts, but has had judgment rendered against it for $675,000. Those dollars represent a substantial amount of "property" assuredly within the reach of the due process clause. An arbitrary denial of the right to defend against a claim strikes nearly at the core of due process concerns, and must be justified by some rational reason. *E.g.*, *Hammond Parking Co.* v. *Arkansas*, 212 U.S. 322, at 351 (1909).

It is also clear that Petitioner has not been afforded an adequate opportunity to vindicate its legitimate defenses

by virtue of the state court's blind adherence to the procedural rule, even in the face of the knowledge that in this case the application of the rule was patently unfair. As noted above, no state interest supports the denial of Petitioner's right to appeal in these circumstances, where both Petitioner's adversary and the court system received notice of the taking of the appeal. Moreover, it could not be said on this record that the failure to file this notice of appeal resulted from *Petitioner's* default of a "reasonable procedural requirement." On this record, the error could be attributed to the court system (or the mail system) as easily as to Petitioner. Yet without any inquiry into fault, or the reasonableness of Petitioner's conduct, the appeal was disallowed on the basis of errors more properly attributable to the State itself than to Petitioner. This is a deprivation of due process. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433-38.

Where there has been no bad faith, willfulness, or fault on the part of petitioner, and where the procedural "default" was "fostered neither by its own conduct nor by circumstances within its control," the loss of the right to prosecute a claim—and the imposition, on a defendant, of a judgment of the magnitude at issue here—violates the fundamental requirements of due process. *See Societe Internationale* v. *Rogers*, 357 U.S. 197 at 210-12 (1958).

The thirty-day limitation for filing a Notice of Appeal is a procedural limitation on the City Hospital's ability to assert its rights. In this respect, some form of hearing is required before the Petitioner is deprived of its protected property interests. At the very least, the Petitioner was deprived of its opportunity to present evidence to the state courts on the appropriate filing of the Notice of Appeal. Here, the state system itself destroyed the City Hospital of Bellaire's property interests, by operation of law, by failing to allow the Petitioner to present evidence that the Notice of Appeal was properly mailed

and received by the Clerk's Office well within the thirty-day limitation period. This is precisely the type of conduct the Fourteenth Amendment protects. The Fourteenth Amendment requires the City Hospital be given "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for a hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). *Boddie* v. *Connecticut*, *supra*. This is such an opportunity that the City Hospital of Bellaire was denied.

An expression often heard is that every litigant is entitled to a trial and at least one review. "Being remedial, appeals and the right of appeal, are favored by the law." 4 Corpus Juris Secundum 88, *Appeal and Error*, Section 20. In the instant case, a situation has developed which demands a remedy. The Petitioner has never had its jury trial (nor any trial) in the Common Pleas Court. Following the trial court decision of August 12, 1985, counsel for The City Hospital mailed the Notice of Appeal well within the time required by App. R. 4(A). On September 5, 1985, counsel for Petitioner mailed a request for transcript of proceedings for inclusion in the record on appeal of the case. This request for transcript of proceedings was filed on September 6, 1985.

Thereafter, after having been notified by counsel for opposing party that the Notice of Appeal was not docketed in the Clerk's Office, counsel for The City Hospital resubmitted a Notice of Appeal which was filed on September 30, 1985. The Court of Appeals' *sua sponte* dismissal of the Notice of Appeal herein deprives The City Hospital of due process of law as guaranteed by the United States and Ohio Constitutions. It is respectfully submitted that this Honorable Court should grant the Petitioner's Writ of Certiorari and allow the appeal on the merits.

B. *Petitioner Has Been Deprived of Equal Protection of the Laws.*

Because the manner in which the procedural rule was applied in this case was without any rational basis, it violates the equal protection clause as well. In this case, Petitioner has been singled out for disqualification of its appeal, not by its own actions, but by the random, arbitrary actions of the State itself. Petitioner proceeded just as have thousands of previous litigants whose appeals have been successfully filed and docketed. This appeal was not heard, and there is no conceivable rationale that would support the State in denying the appeal. In these circumstances, there is a deprivation of the right to equal justice under law that the Fourteenth Amendment guarantees. *See Logan* v. *Zimmerman*, *supra*, at 438-42 (concurring opinion); 443-44 (concurring opinion).

II. The Decision Below Represents A Marked Departure From The Standards That Usually And Historically Govern The Application Of Such Rules To Unique Facts.

These Issues Are Of Great Importance In The Adjudication Of Cases On Their Merits Thereby Ensuring Due Process And Equal Protection Of Law And In Holding Inviolate The Right To Trial By Jury.

A. *In This Case, Petitioner Acted Reasonably In Relying On Mail Delivery of the Notice of Appeal.*

The Supreme Court of Ohio upheld the dismissal by the Court of Appeals. Three Justices dissented in the Court's decision not to hear the appeal on its merits.

App. R. 4 provides in part:

> "In a civil case the notice of appeal required by Rule 3 shall be filed with the Clerk within thirty days of the date of the entry of the judgment or order appealed. . . ."

This Court has held that reliance on the normal course of delivery of mail is reasonable and, therefore, may be the basis for the Court to excuse an otherwise untimely filing of a Notice of Appeal. *Fallen* v. *United States*, 378 U.S. 139 (1964). While the petitioner recognizes that depositing a notice of appeal in the mail is not equivalent to filing it, where here, as in *Fallen*, there are other unique circumstances which evince the notice of appeal as being timely filed, courts have allowed the cause to be heard on its merits. Courts have allowed such causes to be heard on their merits in *Sanchez* v. *Bd. of Regents*, 625 F.2d 521 (5th Cir. 1980) and *Gibbs* v. *Frisco City Police Dept.*, 626 F.2d 1218 (5th Cir. 1980). In those instances, the Courts have held an evidentiary hearing where it has been established without dispute that a mailing of a notice of appeal was consummated well within the applicable time period. In *Gibbs*, *supra*, the Court held that reliance on the mail was excusable neglect and held that the Notice of Appeal was timely filed and proceeded to a review of the causes on the merits. There the Plaintiff's counsel did not check on the filing of the document because he had allowed twice the normal time for a delivery, when, in fact, it took three times the normal time for delivery.

And in *Wright* v. *Deyton*, 757 F.2d 1253 (11th Cir. 1985), the Court followed *Fallen* v. *United States*, *supra*; and remanded the cause. The Court noted that the "inquiry should focus on two distinct periods. First, the district court should examine the pre-mailing delay to see if there is something akin to 'excusable neglect' or 'good cause' which excuses the delay. Second, the district court should determine when the document was mailed and whether, in the ordinary course of events, the clerk would have received the letter by the applicable filing deadline."

Herein, it is uncontested that the Notice of Appeal was mailed on August 30, 1985. The envelope containing

the Notice of Appeal was stamped and placed in the United States Mail for delivery to the Clerk, a distance of appproximately 35 miles from counsel's office. An affidavit to this effect is of record. (App. 50a-51a). On that same date, copies of the Notice of Appeal were sent by ordinary mail to Respondent's counsel, Richard L. Lancione in Bellaire, Ohio, and John G. Lancione in Cleveland, Ohio. (App. 43a and 44a). Copies of the Notice of Appeal *were received by each attorney* for Respondent. The Clerk of Court's Office has yet to receive a copy of the August 30, 1985, Notice of Appeal. The Notice of Appeal and accompanying letter were not returned by the United States Postal Service to Petitioner's counsel. (App. 51a).

B. *Petitioner Was Entitled to Rely On the Clerk of Courts.*

This Court has also established a limited exception so that "[U]nder certain 'unique circumstances,' an appellate tribunal may have jurisdiction to hear an appeal that was not filed within the prescribed time limits."

The "unique circumstances" doctrine was articulated by this Court in three decisions. In *Harris Truck Lines* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), this Court allowed a notice of appeal, filed after the thirty day limit, ". . . in light of the unique circumstances of a case, . . ." *Harris Truck Lines, Inc.*, *id.* at p. 217.

In *Thompson* v. *Immigration Services*, 375 U.S. 384 (1964) (per curiam), this Court held that an appeal from the denial of a petition for naturalization should not be dismissed as untimely under F.R.C.P. 73(a) by the Federal Court of Appeals if taken within sixty days after denial of the post-trial motion. And in *Wolfsohn* v. *Hankin*, 376 U.S. 203, *Reh. Den.*, 376 U.S. 973 (1964), the Court held that a Court of Appeals had improperly

dismissed an appeal as untimely where the District Court from which the appeal was taken granted the Appellant an extension of time within which to move for a rehearing under F.R.C.P. 59, and the subsequent Notice of Appeal was filed within thirty days after the denial of the motion for rehearing, even though the motion for rehearing was not filed until 35 days after the entry of the judgment.

The appropriate circumstances for applying the "unique circumstances" doctrine is that courts permit an appellant to maintain an otherwise untimely appeal under unique circumstances in which the appellant reasonably and in good faith relied upon official action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the action occurred prior to the expiration of the official time. This is particularly appropriate where an appellant could have given timely notice had he not been lolled into inactivity.

It is respectfully submitted that the instant cause fits squarely within the letter and spirit of the "unique circumstances" doctrine. Here, the Petitioner mailed the Notice of Appeal on August 30, 1985. The Petitioner thereafter, on September 5, 1985, mailed the Request for Transcript to the Belmont County Clerk of Courts. The request for transcript was received and filed by the Clerk on September 6, 1985. It is without question that the Petitioner could reasonably and in good faith rely on the Clerk of Courts, a functionary of the Court, to notify the Petitioner that the Clerk had not received the Notice of Appeal when the Clerk received and filed the Request for Transcript Since the 30 day appeal period did not expire until September 12, 1985, the Petitioner, upon being notified by the Clerk, could have made alternative filing arrangements well within the thirty day appeal period.

In a case with similar facts, the Court of Appeals for the 11th Circuit held that if the appellant reasonably and

in good faith relied upon a representation by the District Court prior to the expiration of the official time period that his Notice of Appeal would be timely if mailed on a certain date and was thus lolled into failing to arrange for an alternative method of filing or moving for an extension of time to file, the appeal would not be dismissed as untimely. *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir. 1984).

A Notice of Appeal which was mailed well within the rule (here twelve days), and which for some unknown reason was never received by the Clerk's Office, should be deemed to be timely filed.[2] This is especially so in this case where the opposing party received a copy of the Notice of Appeal well within rule; and where there was also a Request for Transcript for appeal purposes mailed and filed by the Clerk's Office within rule, which was also received by the opposing party within rule.

C. *The Filing of the Request for Transcript is Substantially in Compliance With Rule of Appellate Procedure 3(C).*

There have been numerous instances where Federal Courts have allowed a cause to be heard on its merits where substantial compliance with the Federal Rules of Appellate Procedure have been followed. In *United States* v. *Neal*, 747 F.2d 1022 (10th Cir. 1985), the Court noted, "The question of whether a document is legally sufficient to provide a district court with jurisdiction is one of law and not of fact."

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[2] Petitioner does not claim that the 30 day notice of appeal filing requirement is unconstitutional on its face. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); *Zier* v. *Bureau of Unemployment Compensation*, 151 Ohio St. 123 (1949); *Lunch Co.* v. *Glander*, 147 Ohio St. 147 (1946). It is as *applied* on the facts herein, that it constitutes a denial of due process and equal protection of the laws. This deprivation is especially prejudicial when it also results in a denial of the right to jury trial.

In *United States* v. *UNI Oil, Inc.*, 710 F.2d 1078 (5th Cir. 1983), the Court of Appeals allowed a case to be heard on its merits where the government's notice of appeal was served on counsel for the Defendants and plainly demonstrated an intention to appeal from the judgment below. The Court found this to be sufficient notice under the appellate rules. In *United States* v. *Ward*, 696 F.2d 1315, (11th Cir. 1983) the Court found that "under a liberal reading of Fed. R. App. 3(c), which enumerates the substance of a Notice of Appeal, the appellant's letters to the Federal District Court expressing his intent to appeal his conviction and requesting an appointment of an attorney to represent him in such proceeding satisfy the requirements of the rule. See *also United States* v. *Hoye*, 548 F.2d 1271, 1272 (6th Cir., 1977).

And in *Stevens* v. *Heard*, 674 F.2d 320 (5th Cir., 1982), the Court held that the burden of establishing the sufficiency of a notice of appeal should be on the party who failed to submit the proper document and should a clerk deny filing a pleading or other document which is claimed to be a notice of appeal, the party whose document is denied filing may raise as a judicial issue whether the document was tendered timely and was legally sufficient to serve as a notice of appeal. There, the Court in citing *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974), concluded that a document, which was timely filed with the Court, would be sufficient to perfect an appeal if it "clearly evinces an intent to appeal." The Court specifically found that the filed document should put both the Court and the opposing party on notice. There a Certificate of Probable Cause was held as a matter of law to be equivalent to a notice of appeal under Appellate Rule 3. *Cobb* v. *Lewis, supra.*

In the instant case, it is undisputed that the request for transcript was timely filed. (App. 45a) The request for transcript put both the Court and the opposing party on notice. In fact, the opposing party received a copy

of the unfiled notice of appeal. (App. 43a-44a) The only question would be whether the request for transcript which was timely filed is equivalent to a notice of appeal. The request for transcript clearly indicated the City Hospital of Bellaire's intent to appeal. The receipt and filing by the Clerk's Office gave direct notice of the City Hospital's intent to the Court and notice to the opposing party.

And, in *NOA* v. *Key Futures, Inc.*, 638 F.2d 77 (9th Cir. 1980), the Court held that a stipulation to the entry of a new judgment served as an effective notice of appeal. Specifically, the Court noted that: "documents which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in Court within the time period otherwise provided by Rule 4(A)." The only apparent purpose of the Request for Transcript herein was to permit a proper appeal of the trial court's judgment. The City Hospital intended to appeal, the Defendants had notice of the City Hospital's intent to appeal and believed the City Hospital was appealing, and all parties were proceeding upon the assumption that a viable appeal was pending.

Curiously, the State Court decision herein is actually contrary to prior rulings involving the liberal construction and application of Appellate Rules. In *Maritime* v. *Marina*, 70 Ohio St. 2d 257 (1982), the Ohio Supreme Court stated that a strict construction of the appellate rules is inconsistent with the general attitude taken by the Court towards the construction of procedural rules, case law of Ohio, the purpose underlying the Notice of Appeal requirement, as well as with the position of the United States Supreme Court. *Id.* at 258. The Court went on to state:

> "This Court has long recognized that, in construing the Rules of Appellate Procedure, the law favors and

> protects the right of appeal and that a liberal construction of the rules is required in order to promote the objects of the Appellate Procedure Act and to assist the parties in obtaining justice. *In Re: Guardianship of Love* (1969), 19 Ohio St. 2d 111, 115. See, also, *In Re: Guardianship of Wisner* (1947) 148 Ohio St. 31, 34-35." * * * The legislative purpose through the act was obviously to liberalize procedure upon appeals and to prevent technicalities from being fatal to substantive rights." *Couk* v. *Ocean Accident & Guar. Corp., Ltd.* (1941), 138 Ohio St. 110, 115."

As the Ohio Supreme Court stated in *Capital Loan & Savings Co.* v. *Biery*, 134 Ohio St. 333 (1938), the purpose of the Notice of Appeal is to apprise the opposite party of the taking of an appeal. If this is done within rule so that there is no misundertanding between the parties, the purpose of the notice of appeal is accomplished. *Couk* v. *Ocean Accident & Guar. Corp., supra,* 116 and *Maritime* v. *Marina, supra.*

In *Maritime, supra,* the Ohio Supreme Court further noted that in the spirit of liberal construction of procedural questions and in light of the policies underlying the notice of appeal requirement, the Court found that appellants preserved their rights to appeal. Although the notice of appeal may not have complied in a technical sense with the rule, the notice nonetheless served the purpose intended. The record here indicates that the Court of Appeals and the Respondent were fully advised of the Petitioner's intention to appeal. As stated by Judge Cox:

> "I feel that under the facts of this case, in which all parties agree that the notice of appeal was mailed well within rule, and for some unknown reason was never received by the Clerk's Office, that the appeal, in all fairness, should not be dismissed."

The opposing party was fully advised in that her attorneys, whose affidavits are of record, received copies of the Notice of Appeal of The City Hospital by ordinary mail during the first week in September, 1985.

It is obvious that the clear and expressed intention of The City Hospital was to appeal from the August 12, 1985, final judgment of the trial court. The Notice of Appeal was mailed on August 30, 1985. The request for transcript was mailed on September 5, 1985, and was received and filed by the Clerk's Office on September 6, 1985. The documents did not mislead the Respondent. Under these circumstances, Respondent was not prejudiced or taken by surprise.

The Ohio Supreme Court's dismissal herein is also contrary to its recent decisions involving Appellate Rule 3(C). App. R. 3(C) suggests the use of Form No. 1, but mandates no particular form nor language. The Ohio Supreme Court has held that the filing of the transcript and the record with the Trial Court creates a presumption that the Notice of Appeal was filed. *Dudukovich* v. *Housing Authority*, 58 Ohio St. 2d 202, 205 at ftn. 3 (1979). This presumption was recently applied in *Roseman* v. *Reminderville*, 14 Ohio App. 3d 124, 126 (1984). Furthermore, in appropriate circumstances, the Ohio Supreme Court has allowed an amendment to a Notice of Appeal which was timely filed. In *Richards* v. *Industrial Commission*, 163 Ohio St. 439 (1955), in discussing the statutory predecessor to App. R. 3(C), the Ohio Supreme Court stated that in appropriate circumstances other documents can constitute a notice of appeal.

In *Capital Loan and Savings Co.* v. *Biery*, 134 Ohio St. 333, at 339 (1938), the Ohio Supreme Court found that a journal entry overruling a motion for a new trial and incorporating a Notice of Appeal was sufficient. There, the Court stated:

> "Although not complying in a technical sense with [the rule], it appears to have served the purpose intended.
>
> Manifestly, the purpose of such a notice is to apprise the opposite party of the taking of an appeal. Since such journal entry was approved by counsel for both

parties, both had actual notice thereof. Under the circumstances, Plaintiff could not be prejudiced or taken by surprise." *Id.* at 339.

Obviously, the primary objective of the Notice of Appeal is to make it known that an appeal is being taken. *Cobb* v. *Lewis, supra.* Nothing more than such notice is required to vest jurisdiction of the cause in the Court of Appeals. Furthermore, it has been stated that the principle function of a Notice of Appeal is to advise the opposing party of the taking of an appeal. *Capital Loan & Savings Co.* v. *Biery, supra*; *Cobb* v. *Lewis, supra.* Statutes relating to appeals are remedial and should be liberally construed to the end that the right of appeal may not be defeated, and were not adopted to set traps and pitfalls by way of technicalities for unwary litigants. *Foman* v. *Davis*, 371 U.S. 178 (1962); *Conley* v. *Gibson*, 355 U.S. 41, (1957); *Willis* v. *Newsome, supra.* Nor were the Rules intended to be a rigid code to have an inflexible measuring irrespective of the circumstances. *Fallen* v. *United States, supra.*

Herein, the adverse party actually received a copy of the Notice of Appeal within the time for filing. They further received a copy of the Request for Transcript within the time for filing of the Appeal. The Request for Transcript contained enough information to apprise the opposite party of the particular judgment which was sought to be reviewed. In *United States* v. *Merrick*, 223 F. Supp. 908 (W.D. Mo. 1963), the Court indicated that the Defendant's letter request for a copy of the transcript could have been treated as a Notice of Appeal except for the fact that it was not filed within time in that case. Furthermore, the United States Court of Appeals for the Ninth Circuit in *Thomas* v. *United States*, 328 F.2d 607, 608 (9th Cir. 1964), stated that they were unable to find in the record as timely filed ". . . any document which, by the most liberal construction, can be construed to be a notice of appeal." It is respectfully submitted that under the liberal construction that must

be given the Request for Transcript, the same, under the facts of this case, must be treated as a Notice of Appeal.

On the facts of this case, to refuse to find that sufficient notice of appeal was filed, would be to elevate technicalities to a new height, and to subvert rather than promote substantial justice and the pursuit of justice. Since the Respondent received a copy of the mailed, but purportedly unfiled, Notice of Appeal and the timely filed request for preparation of the transcript for appeal purposes, to deny Petitioner's appeal herein constitutes a denial of due process and equal protection of law.

The Federal Courts have long recognized a common sense approach concerning appellate rules 3 and 4 and have not insisted upon literal compliance in cases in which it cannot fairly be exacted. In *Alley* v. *Dodge Hotel*, 501 F.2d 880 (D.C. Cir. 1974), the Court held that ". . . a filing requirement is met by a positive, substantial and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate that course. . . . [I]t would . . . be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the [rules] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with [them] defeats substantial rights." *Alley*, *supra* at p. 884. See also *Crump* v. *Hill*, 104 F.2d 36, 38 (5th Cir. 1939).

CONCLUSION

To allow the appeal herein would reaffirm the mandate of Civil Rule 1(b) which the Ohio Supreme Court has recently applied to numerous cases, except the instant appeal. In construing Civ. R. 4.4(A) in *Brooks* v. *Rollins*, 9 Ohio St. 3d 8 (1984) Justice Brown stated in his concurring opinion at p. 11:

> "The flawless analysis by Justice William B. Brown of Civ. R. 4.4(A) and R.C. § 2703.14(L) creates a

> legal precedent constituting the quintessence of justice in this case and will cause just results to be reached in many future cases with the same or similar issues. The precedent we establish today is a clarion judicial call that this Court will fulfill the main objective of justice " 'that cases should be decided on their merits,' rather than upon procedural niceties and technicalities," a fundamental tenant of justice espoused in many recent cases. . . . This basic theme of justice fulfills the Civ. R. 1(B) mandate that '[t]hese rules shall be construed and applied to effect just results by eliminating delay * * * and all other impediments to the expeditious administration of justice.' " (Citations omitted)

It is respectfully submitted that the Petitioner's Constitutional rights to due process and equal protection of law, and indeed to a jury trial, have been deprived by the dismissals of the appeals *sua sponte*. This Court should, it is respectfully submitted, grant the Petition for the entertaining of the appeal.

For the foregoing special and important reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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